



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

March 19, 2021

TRANSMITTED VIA EMAIL

The Hon. Chris Mathias
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83720
cmathias@house.idaho.gov

Re: Request for Analysis of House Bill 322

Dear Representative Mathias:

You requested an analysis of House Bill 322, proposed legislation that creates a procedure for Idaho to (1) review whether certain federal actions are authorized, and (2) prohibit enforcement of federal actions that Idaho determines are not authorized. As a sovereign state within a federal system, Idaho has a right to interpret the United States Constitution that it joined and resist unauthorized federal actions that infringe on Idaho's sovereignty. That said, the Idaho Constitution requires the legislative department to respect the powers vested in the executive department to enforce the law and the judicial department to interpret the law. And the United States Constitution requires Idaho to respect the federal government's interpretation of federal law. Because House Bill 322 may in some cases provide for insufficient reverence to the Idaho executive department, the Idaho judicial department, and the federal government, its procedures may be used in violation of the Idaho Constitution and the United States Constitution. Although those potential violations do not necessarily mean House Bill 322 is itself unlawful, the procedure it creates may lead to unlawful actions that ultimately will be struck down and could subject Idaho to liability.

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I. SUMMARY OF PROPOSED LEGISLATION

House Bill 322 creates a procedure for Idaho to (1) review whether certain federal actions¹ are authorized by the United States Constitution, and (2) prohibit enforcement of federal actions that Idaho determines are unauthorized. The procedure includes many steps. To begin, a current Senator or Representative must bring a complaint to the Legislature about the enforceability of the federal action at issue. Next, the Chairman of the Committee on Federalism must survey the Committee. If the Committee determines that the complaint lacks merit, then it must be dismissed. If the Committee determines that the complaint has merit, it must schedule a public hearing and pursue the complaint. At this point, no state agency or political subdivision may take any action or use any resources to give effect to or enforce the challenged federal action until a final determination is made about whether the federal action is authorized.² If after investigation the Committee finds that the federal action “is outside the scope of federal authority or is contrary to the constitution of the state of Idaho,” it must “prepare a report setting forth its findings, recommendation, and reasons for the recommendation to the legislature.” “Legislation may then be introduced proclaiming that the federal action is outside the scope of federal authority.” If that legislation is passed, then Idaho will not recognize the federal action, meaning its agencies and political subdivisions may not give effect to or enforce the federal action.

II. ANALYSIS

Although House Bill 322 is not necessarily unconstitutional on its face, the procedures it creates may be used in violation of the Idaho Constitution and the United States Constitution. I will address those potential violations in turn.

A. Idaho Constitution

House Bill 322’s procedure could be used to deprive Idaho’s executive department of its power to enforce the law and Idaho’s judicial department of its power to interpret the law, which would violate the Idaho Constitution.

Idaho’s government is “divided into three distinct departments[:] the legislative, executive and judicial.” Idaho Const., Article II, § 1. As head of the executive department, the Governor is vested with the “supreme executive power of the state,” which requires “see[ing] that the laws are faithfully executed.” Idaho Const., Article IV, § 5. To discharge

¹ The regulated actions include “federal executive orders, agency orders, rules, policy directives, regulations, acts of congress, or federal court rulings.”

² In your correspondence, you asked whether the proposed legislation might interact with the rulemaking process, including the adoption of temporary and emergency rules. Given that House Bill 322 broadly prohibits state actions that give effect to the federal action at issue, it appears that all forms of rulemaking could be affected—both while Idaho considers the propriety of the federal action and after Idaho determines that the federal action is unauthorized.

his or her mandate to faithfully execute the law, the Governor must enforce all laws, state and federal, that are duly authorized. Indeed, before taking office the Governor must swear that he or she “will support the Constitution of the United States” and do so “according to the best of my ability,” which would include enforcing a standing federal law. Idaho Code 59-401. The judicial department is vested with the “judicial power of the state,” which generally includes the power to interpret laws and enter orders based on those interpretations. Idaho Const., Article V, § 2; *see Powers v. Canyon Cty.*, 108 Idaho 967, 972, 703 P.2d 1342, 1347 (1985) (“Under the Constitution, our courts have the authority to interpret legislation or to declare unconstitutional those legislative acts which do not meet the standards of the state or federal Constitutions.”). In sum, the Idaho Constitution requires the executive department to enforce all duly authorized federal laws and the judicial department to interpret whether government actions comport with law; it also forbids the legislative department from infringing on those executive and judicial powers. *See Idaho Const., Article II, § 1.*

House Bill 322 may be used to infringe upon the powers that the Idaho Constitution vests in the executive and judicial departments. Take a situation in which the Legislature uses House Bill 322 to pass legislation finding that a law passed by Congress and signed by the President is unauthorized and prohibiting the entire state from recognizing that federal law. The Governor vetoes the legislation because he or she believes the prohibited federal law is authorized, and the Legislature overrides the veto meaning the legislation finding that the federal law is unauthorized takes effect. In that scenario, the legislation would prohibit the Governor from enforcing a federal law that he or she thinks is valid, in violation of the constitutional mandate to faithfully execute the law. And the legislation would require the judicial department to treat the federal law as void, in violation of its judicial power to interpret the law.

B. United States Constitution

House Bill 322’s procedure could be used to defy the Supreme Court of the United States’s interpretation of federal law, in violation of the United States Constitution.

On its face, House Bill 322 does not necessarily violate the United States Constitution. The federal government has limited powers. When it acts outside the scope of those limited powers, its acts are unenforceable—“the Federal Government can exercise only the powers granted to it.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534–35 (2012) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819)); *see also Bond v. United States*, 564 U.S. 211, 227 (2011) (Ginsburg, J., concurring) (noting that a conviction for an offense created by an unconstitutional law “is not merely erroneous, but is illegal and void”). House Bill 322 in some ways reflects that reality by permitting Idaho to treat unauthorized federal actions as void and unenforceable, although the same could be done through other means such as filing a lawsuit.

Problems may arise, however, if Idaho uses House Bill 322 to disregard federal actions that it finds are unauthorized when the federal government, particularly the Supreme Court of the United States, finds to the contrary. Idaho is a sovereign state, and with that sovereignty comes Idaho’s right to express when it thinks the federal government

has surpassed its limits, infringing on Idaho's sovereignty. Indeed, some scholars have recognized a "political-safeguards theory," by which politics—perhaps including Idaho's use of House Bill 322 to voice objections to certain federal actions—can be used to secure the proper balance of federalism. Cf. Saikrishna B. Prakash, John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 Tex. L. Rev. 1459, 1459–61 (2001) (explaining certain theories). In any event, the Supremacy Clause provides that federal law "shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI. And "[b]y providing for final review of questions of federal law in [the Supreme Court of the United States], Article III [of the United States Constitution] curtails the sovereign power of [Idaho] to make authoritative determinations of law." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 343–44 (1816)).³ So if the Supreme Court of the United States decides that a federal action is authorized by federal law, then Idaho must comply with the federal action. If Idaho uses House Bill 322's procedure to defy the Supreme Court's interpretation of federal law, it would violate the United States Constitution and in the process it might subject the State to liability for flouting federal law.

Putting aside House Bill 322's overarching procedure, there are potential issues with at least three other components of the proposed legislation worth considering.

First, House Bill 322 temporarily prohibits state agencies and political subdivisions from giving effect to or enforcing a federal action while Idaho considers the propriety of the federal action at issue. This means that even if Idaho ultimately agrees that a federal action is proper, for some time its agencies and political subdivisions must disobey duly authorized federal law. That temporary, and ultimately unjustified, disobedience could lead to liability, even if a conflict between Idaho and the federal government never materializes.

Second, House Bill 322 provides that the Committee on Federalism may find through investigation that a federal action "is contrary to the constitution of the state of Idaho." That phrase is omitted in other parts of the proposed legislation, so it is unclear whether House Bill 322 permits Idaho to (1) find that a federal action is *unauthorized* because it violates the Idaho Constitution, or (2) merely note that the federal action contradicts the Idaho Constitution, but not use that violation to find that the federal action is unauthorized. If the proposed legislation intends to allow the former, it violates the Supremacy Clause as that provision provides that state constitutions must yield to federal law.

³ See also *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 769 (1945) ("[T]his Court, and not the state legislature, is . . . the final arbiter of the competing demands of state and national interests."); *Arthur v. Dunn*, 137 S. Ct. 725, 729 (2017) (Sotomayor, J., dissenting from denial of certiorari) ("And for more than two centuries it has been axiomatic that this Court—not state courts or legislatures—is the final arbiter of the Federal Constitution." (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803))).

Third, the proposed legislation includes “federal court rulings” in the definition of federal actions that Idaho may find are unauthorized. It is unclear how Idaho might determine whether a federal court ruling is unauthorized. If the proposed legislation permits a finding that a court ruling is unauthorized only when a federal court acted outside the bounds of Article III of the United States Constitution—such as when a federal court acted without subject-matter jurisdiction—then this component of the proposed legislation may be permissible, as a federal court’s order typically is not enforceable if the court lacked subject-matter jurisdiction. *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (“It is well settled that a judgment is void if the court that considered it lacked jurisdiction of the subject matter, or if the parties or if [the court] acted in a manner inconsistent with due process of law.” (quotation omitted)). That said, jurisdictional deficiencies are normally litigated in court. But if Idaho uses House Bill 322 to prohibit compliance with a federal court’s decision because Idaho disagrees with the merits of the federal court’s decision—that is, because Idaho disagrees with the federal court’s interpretation of federal law—then Idaho would act unlawfully if it were otherwise bound by the decision. Moreover, if Idaho is a party to the relevant litigation and directly bound by the court order at issue, it would likely be held in contempt, potentially subjecting the State to fines and other punishment.

C. Other concerns

In your correspondence, you asked whether the proposed legislation contradicts any existing Idaho Code, rules, or regulations. Given the supremacy of the potential constitutional issues, I have focused primarily on those issues rather than potential violations of other forms of law. That said, it is possible that House Bill 322’s procedure could be used contrary to Idaho Code, rules, or regulations.

For example, some state laws depend on the existence or interpretation of a federal law. If House Bill 322 is used to modify how Idaho treats a federal corollary, then that might affect the state law as well.

Consider Idaho Admin. Code r. 04.02.01.033. It is an Idaho consumer protection regulation that prohibits certain actions that violate federal law, such as violations of the Federal Truth in Lending Act. If House Bill 322 is used to pass legislation that prohibits enforcement of one of those federal laws or a court’s interpretation of one of those federal laws, then that may affect enforcement of the Idaho regulation as well.

Similarly, Idaho Code § 26-215 is an Idaho statute providing that banks incorporated in Idaho shall be held in full compliance with Idaho law regulating required cash balances if the bank is in compliance with the reserve requirements of the Federal Reserve Act. If House Bill 322 is used to prohibit enforcement of the Federal Reserve Act in Idaho, then that modification could affect or contradict the interpretation and enforcement of Idaho Code § 26-215.

The Hon. Chris Mathias
March 19, 2021
Page 6

These are merely examples of potentially many conflicts. Each specific conflict would have to be analyzed as it arises because the outcome would depend on the specific Idaho law and federal action at issue.

I hope you find this analysis helpful. Please contact me if you have any additional questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Cory Carone", with a stylized flourish at the end.

Cory M. Carone
Deputy Attorney General